Petition

81-5047

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SUPREME COURT, U.S.

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

MARCELO RODRIGUEZ,

Petitioner,

- Against -

DAVID R. HARRIS, Superintendent,
Green Haven Correctional Facility,

Respondent.

Petition for Writ of Certiorari to
the United States Court of
Appeals for the Second Circuit

PETITION FOR CERTIORARI

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Petition for Writ of Certiorari to

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PETITION FOR CERTIORARI

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, entered in the above entitled action on April 16, 1981.

QUESTION PRESENTED FOR REVIEW

Whether Mr. Rodriguez's pro se motion in the United States District Court for voluntary dismissal of his habeas corpus petition should have been granted where the petition contained interrelated exhausted and unexhausted issues?

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unreported and is annexed hereto as exhibit A. The opinion of the United States District Court

for the Southern District of New York (The Honorable Morris E. Lasker) is unreported and is annexed hereto as exhibit B.

JURISDICTIONAL STATEMENT

The final order of the United States Court of Appeals for the Second Circuit was entered on April 16, 1981. Jurisdiction of this Court is conferred pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED

Title 28, section 2254(b) provides:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

STATEMENT OF THE CASE

On August 5, 1976 the petitioner, Marcelo Rodriguez, was convicted in New York Supreme Court, Bronx County, of two counts of intentional murder in the second degree (N.Y. Penal Law § 125.25(1)), two counts of felony murder (N.Y. Penal Law § 125.25(3)) and one count of first degree robbert (N.Y. Penal Law § 160.15(3)). Mr. Rodriguez's conviction was affirmed without opinion by the New York State Appellate Division, First Department, on January 11. 1979 (67 A.D.2d 837, 412 N.Y.S.2d 532) and leave to appeal to the New York Court of Appeals was denied on March 26, 1979 (46 N.Y.2d 1084, 416 N.Y.S.2d 1039, 390 N.E.2d 314). Mr. Rodriguez is presently incarcerated pursuant to that judgment.

On August 9, 1979 Mr. Rodriguez filed a pro se petition for a writ of habeas corpus with the United States District Court for the Southern District of New York in which he sought review of his state court convictions pursuant to 28 U.S.C. § 2254. In his petition Mr. Rodriguez alleged:

(1) that two statements taken from him on the night of his arrest were involuntarily given because, inter alia, he was denied his request to see both a police officer he knew and an attorney before answering questions; and (2) that his court-appointed trial counsel was incompetent in that he failed to pursue this fact at the pre-trial suppression hearing and later at Mr. Rodriguez's trial.

On August 16, 1979 District Court Judge Morris E. Lasker ordered the respondent to file an answer to the petition and simultaneously referred the proceedings to Magistrate Ruth Washington. Respondent filed its responsive papers on October 10, 1979, arguing: (1) that Mr. Rodriguez's statements were properly admitted at trial; and (2) that Mr. Rodriguez's claim of ineffective counsel had not been raised in the state courts and was therefore not exhausted.

On March 10, 1980 Magistrate Washington issued her report to Judge Lasker in which she recommended that the petition be denied as to Mr. Rodriguez's claim of ineffective counsel because "there has been no exhaustion." Magistrate Washington's report is annexed as exhibit C. Specifically, Magistrate Washington found that while Mr. Rodriguez had raised the issue of ineffective counsel in the state courts he had not supported that claim with the same factual allegation he was presently putting forth, i.e. counsel's failure to pursue his request to see Police Officer Tierney and an attorney.

Immediately upon receipt of Magistrate Washington's report Mr. Rodriguez filed a motion for voluntary dismissal of his petition. In his supporting affidavit Mr. Rodriguez asserted that the court lacked jurisdiction to entertain his petition because not all of the issues raised therein were properly exhausted and argued that for the court to go ahead and hear his other, exhausted claims would amount to an unjust and forceful review of the claims and a denial of due process.

On July 9, 1980 Judge Lasker issued a five-page opinion in which he denied both the motion for a voluntary dismissal as well as the petition itself. Judge Lasker found that the introduction of Mr. Rodriguez's two statements did not violate his constitutional rights and further, that Mr. Rodriguez had failed to exhaust his state court remedies as to his claim of ineffective counsel because he had not presented the same factual claim to the state courts that he was now asserting (exhibit B at 4). Judge Lasker noted that Mr. Rodriguez was incorrect in his assertion that the court lacked jurisdiction to entertain the partially-exhausted petition and, after concluding that Mr. Rodriguez "presents no persuasive reason why the matters presented in the petition should not be presently determined," denied Mr. Rodriguez's motion for a voluntary dismissal of his petition (exhibit B at 4-5).

Mr. Rodriguez appealed the district court's decision to the United States Court of Appeals for the Second Circuit. On April 16, 1981 that court affirmed the lower court judgment in full, writing, in relevant part: "Judge Lasker did not abuse his discretion in denying Rodriguez's motion to dismiss without prejudice his habeas corpus petition, which contained both exhausted and unexhausted claims" (exhibit A at 2).

REASONS FOR GRANTING THE WRIT

For nearly one hundred years federal judicial policy has required that state prisoners seeking collateral review of their convictions in a federal tribunal must first have "exhausted" available state remedies. See Picard v. Connor, 404 U.S. 270, 275 (1971); Ex parte Hawk, 321 U.S. 114, 117 (1944); Ex parte Royall, 117 U.S. 241, 252-53 (1886). The exhaustion doctrine, now codified in the federal habeas corpus statute, 28 U.S.C. § 2254(b), is rooted in considerations of federal-state comity: "'[I]t would be unseemly in our dual system of government to upset a state court conviction without an opportunity to the state courts to correct a constitutional

violation.'" Fay v. Noia, 372 U.S. 391, 419-20 (1963) (quoting Darr v. Burford, 339 U.S. 200, 204 (1950)); see Wilwording v. Swenson, 404 U.S. 249, 250 (1971).

Federal abstention serves two interests: it preserves the significant role the state courts must play in the enforcement of federal constitutional rights and it preserves the orderly, unimpeded administration of justice by the state courts. Braden v. Circuit Court, 410 U.S. 484, 480-81 (1973); Developments in the Law -- Federal Habeas Corpus, 93 Harv. L. Rev. 1038, 1094 (1970).

It follows, therefore, that when a habeas petition presents both exhausted and unexhausted claims federal-state comity is not disturbed when a federal court rules on the unrelated exhausted claims. See, e.g., Miller v. Hall, 536 F.2d 967, 968-69 (1st Cir. 1976); Tyler v. Swenson, 483 F.2d 611, 615 (8th Cir. 1973); Hewett v. North Carolina, 415 F.2d 1316, 1320 (4th Cir. 1969); United States ex rel. Boyance v. Myers, 372 F.2d 111, 112 (3rd Cir. 1967). But see Galtieri v. Wainwright, 582 F.2d 348, 356 (5th Cir. 1978); Gonzales v. Stone, 546 F.2d 807, 809 (9th Cir. 1976).* In such cases "[t]he rule of comity . . . precludes granting relief to a state prisoner in a collateral federal proceeding until the state courts shall have had an opportunity to consider the petitioner's claim has been fully satisfied"; United States ex rel. Boyance v. Myers, 372 F.2d at 112; "[t]he very fact of exhaustion means that the state courts have ruled, or have had the chance to rule [,] on the federal claim in the first instance." Miller v. Hall, 536 F.2d at 969.

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* This Court recently granted certiorari in Rose v. Lundy, 49 U.S.L.W. 3617 (Feb. 23, 1981)(No. 80-846). One of the issues presented in Lundy is whether this practice of hearing unrelated exhausted claims accords with the proper interpretation of the exhaustion doctrine. If this Court holds that it does not then petitioner respectfully asks this Court to reverse the decision of the Second Circuit in the instant case on that authority.

Where, however, the exhausted and unexhausted claims are interrelated federal-state comity is violated.

> A rule allowing a federal court to consider the exhausted claims in a petition for writ of habeas corpus would almost surely interfere with the state court's subsequent review of the petition's unexhausted, though . . . related, claims. This would impair comity.

Gonzales v. Stone, 546 F.2d at 809; Blunt v. Wolff, 501 F.2d 1138, 1141-42 (8th Cir. 1974). This conclusion is easily reached where, for example, the exhausted and unexhausted claims, while based on different legal theories, are grounded on the same disputed fact or facts. If the federal court rules on the exhausted claim it must resolve the disputed facts -- either expressly or impliedly. In such a case the federal court would necessarily be substituting its factfinding for that of the state court. At least one commentator has likened the effect of such a practice to collateral estoppel and concluded: "Federal adjudication at this juncture, then, would not only imply distrust in the ability of state judges to decide the unexhausted questions without federal assistance, but also would adversely affect the operation of state criminal processes." 54 N.Y.U. L. Rev. 1428, 1451-52 (1977); cf. Sumner v. Mata, 101 S. Ct. 764, 768-69 (1981) (interpreting 28 U.S.C. § 2254(d)).

In the instant case Mr. Rodriguez grounded two claims on the same disputed fact -- his request to see Police Officer Tierney and an attorney. Specifically, Mr. Rodriguez claims that his two statements made on the night of his arrest were involuntary because, inter alia, he was denied access to his friend Officer Tierney and an attorney* and that trial counsel's failure to pursue the fact of his requests amounted

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* These facts, if proven, would render the statements inadmissible. Miranda v. Arizona, 384 U.S. 436, 475-76 (1966). While the refusal to allow Mr. Rodriguez to see the police officer does not amount to a per se constitutional violation, it is a factor to be considered in determining whether Mr. Rodriguez's statements were voluntary. See Fare v. Michael C., 442 U.S. 707, 724 (1979); Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

to a denial of his right to effective assistance of counsel.*

The District Court, however, found that Mr. Rodriquez's statements were voluntary, thereby impliedly finding that Mr. Rodriquez did not ask to see the officer and an attorney or that the denial was harmless. The District Court also ruled that Mr. Rodriquez had not exhausted his claim of ineffective counsel.

The practical effect of these combined rulings is to force Mr. Rodriquez to return to the state court and raise there a claim which the federal court has, for all practical purposes, already found to be without merit. The state court, on a subsequent review of the unexhausted ineffective counsel claim would undoubtedly be influenced by the relevant factual determinations in the federal court. Such interference with state review is clearly improper. See Miller v. Hall, 536 F.2d 967, 969 (1st Cir. 1976).

Wholly apart from the considerations of comity, the court below erred, on other grounds, by denying Mr. Rodriquez's motion for a voluntary dismissal. Those circuits which allow district courts to review exhausted claims of "mixed" habeas petitions have expressly grounded their decisions upon a balancing of two competing interests: the need to prevent fragmented litigation and the petitioner's desire for an early hearing of his claim. In this context, the courts have concluded: "[T]he desirability of including all grounds for habeas corpus in a single petition does not outweigh the interests of a prisoner in obtaining prompt federal consideration of exhausted claims." United States ex rel. Levy v. McMann, 394 F.2d 402, 404-05 (2d Cir. 1968); accord, Miller v. Hall, 536 F.2d 967, 968-69 (1st Cir. 1976);

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* Again, these facts, if proven, would amount to a constitutional violation. See Tollett v. Henderson, 411 U.S. 258, 266-67 (1973); McMann v. Richardson, 379 U.S. 759, 770-71 (1970).

Tyler v. Swenson, 483 F.2d 611, 614-15 (8th Cir. 1973); United States ex rel. Boyance v. Myers, 372 F.2d 111, 112 (3rd Cir. 1967).

Such a rationale is inapplicable, however, where, as here, the petitioner has not requested a speedy disposition of his claim but has, in effect, asked that the petition be returned so that it can be put in proper form. Clearly, absent the interest of the prisoner in obtaining speedy relief, society's interest in avoiding piecemeal litigation should control and dismissal should be granted. See generally Wainwright v. Sykes, 432 U.S. 72, 88-89 (1977); Stone v. Powell, 428 U.S. 465, 491-94 (1976); Schneckloth v. Bustamonte, 412 U.S. 218, 274 (1973)(Powell, J., concurring).

This Court should grant certiorari to consider the issue presented in this case, as the decision of the court below, if allowed to stand, will have significant impact on the efficient use of judicial resources in collateral proceedings. Denial of the motion to withdraw the petition for writ of habeas corpus resulted in a piecemeal review by the district court and the court of appeals of the exhausted issues while reserving the unexhausted claim for subsequent review. Therefore, should the state courts reject Mr. Rodriguez's claim of ineffective assistance of counsel, the federal courts will be faced with another review of this case.

This needless bifurcation does not serve the interests of judicial economy or federal-state comity. Had the motion to withdraw been granted after the magistrate's initial review,*

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* Such preliminary review of habeas petitions is, of course, one of the magistrate's primary functions. See H.R. Rep. No. 1609, 94th Cong., 2d Sess. 5 (1976), reprinted in [1976] U.S. Code Cong. & Ad. News 6162, 6164; S. Rep. No. 371, 90th Cong., 1st Sess. 26 (1967).

Mr. Rodriguez would have had an opportunity to present his claim to the state courts and then, if necessary, return to the federal courts for one complete review of all of the issues presented in his case. This Court should grant the petition to resolve this important issue of judicial administration.

CONCLUSION

For the above-mentioned reasons petitioner respectfully asks this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit in this action.

Respectfully submitted,

By Sheila Ginsberg

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United States Court of Appeals

FOR THE

SECOND CIRCUIT

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

At a stated Term of the United States Court of Appeals for the Second t, held at the United States Courthouse in the City of New York, on the sixteenth day of April

busand nine hundred and eighty-one.

UNITED STATES COURT OF APPEALS
FILED
APR 16 1981
SECOND CIRCUIT

t:

HONORABLE IRVING R. KAUFMAN,

HONORABLE AMALYA L. KEARSE,
Circuit Judges,

HONORABLE JACK B. WEINSTEIN,
District Judge, sitting by designation.

80-2300

MARCELO RODRIGUEZ,
Petitioner-Appellant,

v.

DAVID R. HARRIS, Superintendent
Green Haven Correctional Facility,
Respondent-Appellee.

80-2300

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Petitioner Rodriguez has failed to establish by convincing evidence that the factual determinations resulting from a suppression hearing conducted in state court are erroneous. 28 U.S.C. § 2254(d)(8); Sumner v. Mata, 101 S.Ct. 764, 768-69 (1981); Tanner v. Vincent, 541 F.2d 932, 937 (2d Cir. 1976), cert. denied, 429 U.S. 1065 (1977). In reaching its conclusion that two statements were lawfully obtained from petitioner by Detective Farrell and Assistant District Attorney Bernheim, Miranda v. Arizona, 384 U.S. 436, 444 (1966), the state court explicitly evaluated testimony of

Exhibit A

petitioner and law enforcement officials, and found the former's testimony to be "incredible." Based on the record established at the suppression hearing, we agree that under the "totality of circumstances," Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973), Rodriguez voluntarily waived his constitutional right not to make a statement. Accordingly, the two statements were lawfully admitted into evidence.

2. Although Rodriguez was not permitted to confront the person who noted the license plate number of his car leaving the scene of the robbery in question, admission of that slip of paper into evidence was, at most, harmless error. Chapman v. California, 386 U.S. 18, 23-24 (1967).

3. We reject petitioner's argument that Judge Lasker erred in dismissing his ineffective assistance of counsel claim for failure to exhaust state remedies. The specific claim raised in the habeas corpus petition -- that counsel failed to develop the facts concerning petitioner's request to see an attorney or his friend Officer Tierney -- was not raised on direct appeal. This claim, therefore, was not "fairly presented" to the state court, Picard v. Connor, 404 U.S. 270, 275 (1971); see 28 U.S.C. § 2254(b), (c).

4. Judge Lasker did not abuse his discretion in denying Rodriguez's motion to dismiss without prejudice his habeas corpus petition, Armstrong v. Frostie Company, 453 F.2d 914, 916 (4th Cir. 1971); United States v. Gunc, 435 F.2d 465, 467 (8th Cir. 1970), which contained both exhausted and non-exhausted claims. United States ex rel. Levy v. McMann, 394 F.2d 402, 404-05 (2d Cir. 1968).

Irving R. Kaufman
IRVING R. KAUFMAN,

Amalya L. Kearse
AMALYA L. KEARSE, Circuit Judges,

Jack B. Weinstein
JACK B. WEINSTEIN, District Judge.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

MARCELO RODRIGUEZ,

Petitioner,

-against-

DAVID R. HARRIS, SUPERINTENDENT,
GREEN HAVEN CORRECTIONAL FACILITY,

Respondent.
----------X

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79 CIV. 4177 (MEL)

APPEARANCES:

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Copies have been mailed to the parties. ac

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LASKER, D.J.

Marcelo Rodriguez's petition for a writ of habeas corpus was referred to the Honorable Ruth Washington, Magistrate of this court, for report and recommendation. By her report of March 10, 1980, the Magistrate recommends that the petition be denied. The recommendation is adopted.

Magistrate Washington's report carefully reviews the factual background of the case, analyzes the issue of exhaustion of remedies and discusses the merits of the four claims made by the petitioner. Those claims are as follows: A) that petitioner was denied his Fourteenth Amendment right to due process by the introduction into evidence of two allegedly coerced confessions; B) that no rational trier of the facts could reasonably have convicted the petitioner on the evidence adduced at trial; C) that petitioner's Sixth Amendment rights were violated by a claimed inability on his part to confront a witness against him; and D) that he was denied effective assistance of counsel.

I.

A. The Confessions

We agree with the Magistrate that the petitioner was not denied his constitutional rights by the introduction into evidence of his confessions. The issue of the

validity of these confessions was raised before trial in a lengthy Huntley hearing. At the conclusion of the hearing at which Rodriguez, of course, testified, the court specifically found Rodriguez's testimony incredible, and that of the State witnesses credible; found that the required Miranda warnings had been given; that petitioner had intelligently waived his constitutional rights not to make a statement and that his statements were voluntary. The Huntley proceedings met the controlling standards set forth in La Vallee v. Delle Rose, 410 U.S. 690 (1973). See, also, United States ex rel. Stanbridge v. Zelker, 514 F.2d 45 (2d Cir.), cert. denied, 423 U.S. 872 (1975).

B. Insufficient Evidence to Convict

Jackson v. Virginia, 443 U.S. 307 (1979), held that "... assuming that state remedies have been exhausted ... and that no independent and adequate state ground stands as a bar," a claim by a State prisoner "that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt ... is cognizable in a federal habeas corpus proceeding." 443 U.S. at 321. Under Jackson, it is arguable that petitioner's claim that the evidence was insufficient to convict him is ripe for decision here. We need not decide that question, however, since petitioner's claim that the evidence was insufficient

must be denied. We have already concluded that petitioner's confessions were validly placed in evidence. The confessions alone, and certainly supplemented by the testimony of the witnesses as to the circumstances of the crime, were "sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt."

C. Inability to Confront A Witness

At the trial, Collette DiFrisco was allowed to testify that an unnamed "kid" had given her license plate #968XLS as being that of a car associated with the crime. Evidence established that the car so licensed belonged to petitioner's mother. Petitioner claims that permitting DiFrisco to testify was the functional equivalent of putting in evidence the testimony of the "kid" who gave her this information, thereby denying petitioner the right to cross-examine the "kid". However, even if the procedure followed unconstitutionally deprived the petitioner of the right to confront a witness -- a question we do not decide -- it would nevertheless be insufficient to support granting the writ in this case. The evidence against petitioner, including his confessions, was overwhelming and there is no basis for the belief that had petitioner been granted the opportunity to cross-examine the "kid" the jury would have failed to convict. Moreover, the defense made no demand at trial that the "kid" be called as a witness.

D. Denial of Effective Assistance of Counsel

Petitioner claims that his counsel failed to pursue petitioner's request to see his friend, Police Officer John Tierney, prior to interrogation at the Police Precinct. Whatever the merit or lack of merit of this claim, we agree with the Magistrate that, since it was not presented to the State Court petitioner has failed to exhaust his remedies as to this claim which must, therefore, be denied.

II.

Petitioner's Motion for Voluntary Dismissal

Upon receipt of a copy of the Magistrate's report recommending that his petition be dismissed on the merits, petitioner filed a motion to allow him voluntarily to dismiss his petition under Rule 41, Fed. R. Civ. P. That motion is also denied. The petitioner is incorrect in his argument that where exhaustion has not occurred as to some of the claims in a petition, the entire petition must be dismissed without prejudice. As stated in Cameron v. Fastoff, 543 F.2d 971, 976 (2d Cir. 1976), a district court may "rule on the merits on one claim that has been exhausted, while declining to rule on those claims that have not been exhausted." See, also, United States ex rel. Annunziato v. Deegan, 440 F.2d 304 (2d Cir. 1971).

Petitioner further states that his original petition was so vague and poorly drafted that the full import

of his constitutional claims could not be understood. The substance of Magistrate Washington's report belies that claim. In brief, the motion under Rule 41 presents no persuasive reason why the matters presented in the petition should not be presently determined.

For the reasons stated, the petition and the motion to allow its voluntary dismissal under Rule 41 are both denied. Certificate of probable cause is granted with regard to the petition for a writ of habeas corpus, and the petitioner may appeal in forma pauperis.

It is so ordered.

Dated: New York, New York
July 9, 1980

Kenneth Conboy
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARCELO RODRIGUEZ,

Plaintiff,

-against-

DAVID R. HARRIS, Superintendent
Greenhaven Correctional Facility,

Defendant.

FILED
OCT 11 1980
S.D. OF N.Y.

REPORT AND RECOMMENDATION

79 Civ. 1177 (MEL)

TO: THE HONORABLE MORRIS E. LASKER, U.S.D.J.

Marcelo Rodriguez (Petitioner) appearing pro se seeks a writ of habeas corpus pursuant to 28 U.S.C. Section 2254. The petitioner is presently incarcerated at Greenhaven Correctional Facility. His petition, dated July 25, 1979, together with an order permitting petitioner to proceed in forma pauperis signed by the Honorable Lloyd F. MacMahon dated August 7, 1979 was filed in this court and was assigned to the Honorable Morris E. Lasker.

On August 23, 1979, petitioner filed for leave to amend his petition. Judge Lasker extended the time within which to reply to October 11, 1979, and the District Attorney* filed his Affidavit in Opposition and Memorandum of Law, copies of which were served by mail upon the petitioner on October 11, 1979.

* By agreement between the Attorney General and the Office of the District Attorney, Bronx County, the latter office is to respond to an application for a writ of habeas corpus when the underlying state conviction is for murder.

Thereafter by order dated October 16, 1979, the matter was referred to the undersigned for Report and Recommendation. The petitioner subsequently filed (a) a notice of motion to strike insufficient defenses, sworn to October 31, 1979, a copy of which was served by mail upon the District Attorney on that date, and (b) an Affidavit regarding petitioner's lack of opportunity to appeal on the entire record, sworn to January 24, 1980, a copy of which was served by mail upon the District Attorney on that date.

Upon consideration of the aforesaid papers, together with the briefs for the Defendant-Appellant (in addition to the brief filed by his attorney, petitioner filed a pro se supplemental brief) and the brief of Respondent Bronx District Attorney filed relative to petitioner's appeal to the Appellate Division, First Department, and the trial record, I recommend that a petition for a writ of habeas corpus be denied.

FACTUAL BACKGROUND

On July 21, 1975, the Foodway Supermarket at 3448 Boston Road in the Bronx was robbed of $5700. During the course of that robbery, two Foodway employees, Anthony Miles and Ping Chan were shot and killed (TT 12-14,51-52).* Information from witnesses led to the a rest of the petitioner, Marcelo Rodriguez, alias James Trofton, on July 23, 1976 (TT 267, 270, 272). In the car on the way to the police precinct and at the police precinct, Rodriguez was given his Miranda warnings (TT 273-275). After some forty-five

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* TT refers to the trial transcript. H-W refers to the transcript of the Huntley-Wade hearing.

minutes of questioning by Detective James Farrell, petitioner admitted that he had participated in the Foodway robbery, but denied any involvement in the murders of Chan and Miles. Petitioner stated that the robbery was carried out by three men: himself, "Mike the Ape, and a third man unknown to petitioner, the third man was armed with a gun and shot the two young men (TT 278-282). Petitioner repeated his statement to an assistant district attorney who was summoned to the police precinct (TT 352, 362-373).

Petitioner was convicted on June 10, 1976 in Bronx County for murder in the second degree (two counts of intentional murder and two counts of felony murder) and robbery in the first degree after a trial before the Honorable John Reilly, Justice of the Supreme Court of the State of New York. On August 5, 1976, petitioner was sentenced to four indeterminate periods of imprisonment with minimum terms of twenty-five years and maximum terms of life for each of the four murder counts, and to an indeterminate period of imprisonment with a maximum term of twenty-five years for the robbery count. The two twenty-five years to life sentences for the intentional murder counts were to run consecutively. The remaining sentences were to run concurrently with each other and with the sentences for the intentional murder counts.

That conviction was unanimously affirmed without opinion by the Appellate Division, First Department of the Supreme Court of the State of New York on January 11, 1979 (67 A.D. 2d 837), and leave to appeal to the Court of Appeals was denied on March 26, 1979, (46 NY 2d 1084, 412 NYS 2d 532).

DISCUSSION

Petitioner has advanced four grounds upon which he contends he is entitled to habeas corpus relief. Since the first of those claims contains no allegation of violation of constitutional rights, it is not properly before this court.* Petitioner's other claims are that his Sixth Amendment rights were violated by admission into evidence of a slip of paper containing a license plate number; that he was denied his Fourteenth Amendment right to due process by the introduction into evidence of two coerced confessions and that his attorney's ineffective assistance constituted a violation of his fundamental rights.

A writ of habeas corpus is not granted unless it appears certain that the applicant has exhausted the remedies available in the state courts. 28 U.S.C. §2254. The petitioner is required not merely to have appealed his conviction but to have presented the state courts with the same claim which he urges upon the federal courts. Picard v. Connor, 404 U.S. 270, 275 (1971). See also, United States ex rel Nelson v. Zelker, 465 F.2d 1121, 1124 (2d Cir. 1972) cert. denied, 409 U.S. 1045, 93 S. Ct. 544, 34 L. Ed. 2d 497 (1972). "Same claim" means a presentation not only of the same factual basis for the claim but the same legal basis as well. E.g., Picard V. Connor, supra; Gayle v. LeFevre, No. 78-2158 (2d

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* 28 U.S.C. Section 2254,

Cir., Jan 11, 1980; Twitty v. Smith, No. 79-2120 (2d Cir., Dec. 11, 1979. Twitty noted that:

> The goal of these requirements, in the interest of federal-state comity, is simply to ensure that the federal courts not intrude upon state proceedings unless and until the state courts have been given a fair opportunity to consider and act upon the claims on which tne habeas corpus petition is based.

Therefore, the claim which the petitioner urges in the federal courts must have been presented as a federal constitutional claim in the state appellate procedure. Gayle v. LeFevre, supra; Johnson v. Metz, No. 79-2028 (2d Cir. Dec. 4, 1979).

The due process claim regarding petitioner's confessions was raised on appeal by his court appointed attorney. While it is true that neither petitioner's pro se appellate brief nor his attorney's brief specified that petitioner's Fourteenth Amendment rights had been violated, there is sufficient discussion of "constitutional rights", "constitutional error" and "due process" to have alerted the state's appellate court that petitioner was in fact alleging a federal constitutional claim. Unlike the situation in United Stat s ex rel. Nelson v. Zelker, supra in which this Circuit held that a general due process argument made in the state court did not meet the "fair opportunity" test of Picard, petitioner in the instant case couched his argument in constitutional terms and relied almost entirely on federal cases relative to coerced confessions and constitutional rights. Cf. Fielding v. LeFevre, 548 F.2d 1102, fn.8 at 1107 (2d Cir. 1977)(glancing reference to alleged threat made by trial judge coupled with a federal citation

was insufficient to pass "fair opportunity" test).* Thus it can fairly be said that petitioner has exhausted his state remedies on this claim.

With respect to the claim of ineffective counsel, petitioner argued in his pro se appellate brief that ineffective counsel deprived him of his "fundamental rights". While petitioner did not expressly cite the Constitution, he did cite federal authorities in support of his claims and expressly called the attention of the appellate court to the leading case in this Circuit on the standard of effectiveness of counsel required by the United States Constitution. United States v. Wight, 176 F.2d 376 (2d Cir. 1949), cert. denied, 338 U.S. 940 (1950).

This circuit in Twitty v. Smith, supra at 592-593 recently held that "the mention of 'effective assistance of counsel' instantly calls to mind the Sixth Amendment's guaranty of the accused's right 'to have the assistance of counsel for his defence.'" Thus it can fairly be said that the state courts were aware that a federal constitutional claim was involved. However, since the specific instance of ineffectiveness of counsel which petitioner raises here, i.e. counsel failed to pursue the issue of petitioner's request to see his friend, Police Officer John Tierney, prior to any interrogation at the police precinct, was not presented to the state court, there has been no exhaustion of this claim. Unless the facts on which defendant relies have been called to the attention of the state court, the state was never presented with an

* See also Wilson v. Fogg, 571 F.2d 91, 94 (2d Cir. 1978) (failure to mention invasion of constitutional rights coupled with cases addressing the issue in constitutional terms did not meet exhaustion requirement); Cameron v. Falstaff, 543 F.2d 971, 977(2d Cir. 1976) (claim that invocation of Fifth Amendment by a witness violated rights under state law not sufficient to satisfy exhaustion requirement.

opportunity to consider the claim and hence there has been no exhaustion. See Twitty, supra, at 594.

The final claim presented in this application relates to a violation of petitioner's Sixth Amendment right to confront the witnesses against him. This point was addressed in petitioner's pro se appellate brief which was filed after the District Attorney's office had responded to the arguments in the brief of petitioner's court appointed attorney. Since it is clear that satisfaction of the exhaustion requirement cannot be thwarted by the state appellate court's failure to expressly address the issue in an opinion affirming a conviction, Smith v. Digmon 434 U.S. 332, 98 S. Ct. 597, 54 L. Ed. 582 (1978); the denial of a habeas corpus petition on exhaus ion grounds based on the failure of the respondent to confront a federal constitutional claim would be equally inconceivable. The Picard test merely requires that the state have the fair opportunity to address the issue. The fact that the issue raised in petitioner's brief is ignored in the state proceedings can not be the determining factor in the exhaustion inquiry. See, Smith v. Digmon, supra.

Consequently, the merits of only two claims can be considered here: that petitioner's Fourteenth Amendment right to due process was violated by the introduction into evidence of two coerced confessions and that his Sixth Amendment rights were violated by the lack of opportunity to confront a witness against him. It is believed that the due process claim is the more serious of petitioner's contention that his constitutional guarantees were abridged. Throughout the entire proceeding, from the Huntley-Wade hearing to the trial; the state appellate courts and the federal court by way of the instant petition, Rodriguez has maintained that his confessions were not given voluntarily. The court's

ruling at the Huntley-Wade hearing specifically rejected this claim:

> This court finds beyond a reasonable doubt the defendant's constitutional rights were not violated, and that the warnings were given to the defendant and that the defendant did intelligently waive said constitutional rights and accordingly, I find that the statements of the defendant were voluntary.

The role of the federal court in reviewing state court convictions is to independently determine whether on the basis of the undisputed facts there is merit to petitioner's claim that his confessions were not voluntary. United States ex rel. Wade v. Jackson, 256 F.2d 7,9 (2d Cir.), cert denied, 357 U.S. 908, 78 S. Ct. 1152, 2 L.Ed. 2d 1158 (1958). In this collateral federal proceeding, the findings of fact of the state courts are presumptively correct, pursuant to 28 U.S.C. §2254(d). See, Tanner v. Vincent, 541 F.2d 932, 937 (2d Cir. 1976), cert. denied, 429 U.S. 1065, 97 S.Ct. 794, 50 L.Ed. 2d 782 (1977); United States ex rel. Regina v. La Vallee, 504 F.2d 580, 582 (2d Cir. 1974), cert denied, 420 U.S. 947, 95 S.Ct. 1330, 43 L.Ed. 2d 425 (1975).

A review of the record reveals that there is no real dispute concerning petitioner's arrest and the fact that he defecated in his pants before being placed in the police car for the ride to the precinct house. The events in the car and at the 47th precinct are in dispute. Petitioner testified at the Huntley-Wade hearing that he was not given his rights in the car, nor at the precinct by detective Farrell, the officer who questioned him. (H-W 259-60). Petitioner stated that he had been pushed and shoved and had been the target of racial slurs. He claimed that he was told that his mother would be imprisoned if he did not speak.

Moreover, according to petitioner, Detective Farrell struck him and put a gun in his mouth (H-W 240-242).

The testimony of police officer at the 47th precinct contradicted petitioner's statement. Detective Farrell testified that petitioner was twice informed of his Miranda rights and that Rodriguez claimed that he understood them (H-W 11,13). According to Farrell, petitioner stated that he knew all about his rights (H-W 53,308-309). Petitioner's testimony would seem to indicate that he was somewhat of a scholar with regard to the Miranda line of cases (H-W 255, 258-59). Farrell emphatically denied any physical abuse (H-W 49,56). Other police officers testified that the door of the room in which Farrell questioned Rodriguez was open (TT 311); that other officers did enter the room during the questioning and that they not only did not see any evidence of physical abuse, but that at no time did they hear any cries or screams (H-W 298-298A, 310). After some forty-five minutes of interrogation, petitioner gave the first of the confessions introduced into evidence at his trial (H-W 44). A short time after petitioner's first statement, he was given the clean clothing which his family brought. Petitioner then washed and changed his clothes (H-W 130-131). Assistant District Attorney Bernheim, who arrived at the precinct within four hours of petitioner's arrest, found him to be calm, in excellent physical condition, and interested in discussing the crime (H-W 222,224, 226-27).

The Huntley judge certainly considered this entire issue. His opinion recounted the testimony on the issues of the Miranda warnings and the physical abuse, and specifically concluded that the petitioner had been advised of his rights and that the confessions had been given voluntarily (H-W 357). There being no

assumption that the Huntley judge applied the incorrect constitutional standards to this issue, See, e.g. La Vallee v. Delle Rose, 410 U.S. 690, 93 S. Ct. 1203, 35 L.Ed. 2d 637 (1973), it cannot be said that the state factual determination is not fairly supported by the record. The burden rests with the petitioner to establish by convincing evidence that the factual determinations in the Huntley hearing were erroneous. See,United States ex rel. Stanbridge v. Zelker, 514 F.2d 45, (2d Cir. 1975), cert denied, sub nom. Stanbridge v. Zelker, 423 U.S. 872, 96 S.Ct. 138, 46 L. Ed. 2d 102 (1975); United States ex rel. Cronan v. Mancusi, 444 F.2d 51 (2d Cir. 1971); United States ex rel. Coleman v. Mancusi, 423 F.2d 985 (2d Cir. 1970). The petitioner has failed to meet this burden.

Petitioner has alleged that he was denied his Sixth Amendment right to confront one of the witnesses against him. If the petitioner was denied the "ability to put on the stand a witness who was physically and mentally capable of testifying to an event that he had personally observed and whose testimony would have been relevant and material to the defense", the state court would have violated petitioner's fundamental rights. Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed. 2d 1019 (1967). If petitioner is claiming that he was denied the right to be confronted by the "Mysterious Kid"* who called out the license plate number of the car seen leaving the scene of the crime,

* Petitioner's brief to the state Appellate Division, pg. 77.

which number was then immediately written down by the witness Difrisco; no reasonable reading of the record could possibly reveal that petitioner was in any way prejudiced by the absence of the testimony of the "Mysterious Kid". There is no question that there was ample cross examination of Difrisco and moreover no demand was ever made that any other witness be called. Absent any showing that there was any resulting prejudice, it is clear that there was no violation of constitutional rights. See, e.g., United States ex rel. Garcia v. Follette, 417 F.2d 709 (2d Cir. 1969).

RECOMMENDATION

For all the reasons hereinabove set forth, I must conclude that petitioner was not deprived of his constitutional right of due process under the Fourteenth Amendment or the right to confront a witness against him as guaranteed by the Sixth Amendment. Therefore, it is my recommendation that the petition for a writ of habeas corpus be denied.

Copies of this Report have been mailed this date to petitioner and to counsel for respondent who are hereby instructed that any objections to this Report should be filed at your chambers by March 24, 1980.

Dated: New York, New York
March 10, 1980

Respectfully submitted,

RUTH V. WASHINGTON
UNITED STATES MAGISTRATE

81-5047

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No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

MARCELO RODRIGUEZ,

Petitioner,

- Against -

DAVID R. HARRIS, Superintendent,
Green Haven Correctional Facility,

Respondent.

Motion for Leave to Proceed In
Forma Pauperis

The petitioner, Marcelo Rodriguez, who is now held in Green Haven Correctional Facility, Stormville, New York, asks leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The petitioner was represented in the Court below by Sheila Ginsberg, counsel assigned pursuant to the Criminal Justice Act.

By Sheila Ginsberg

Sheila Ginsberg
40 West 57th Street
New York, New York 10019
(212) 977-9700
Attorney for Petitioner

Opposition

ORIGINAL
WITH
AFFIDAVIT OF SERVICE

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IN THE

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OCTOBER TERM, 1981

No. 81-5047

MARCELO RODRIGUEZ,

Petitioner

- against -

DAVID R. HARRIS, Superintendant,
Green Haven Correctional Facility,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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DAVID H. FROMM
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IN THE

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OCTOBER TERM, 1981

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MARCELO RODRIGUEZ,

Petitioner

- against -

DAVID R. HARRIS, Superintendant,
Green Haven Correctional Facility,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, DAVID R. HARRIS, Superintendent of the Green Haven Correctional Facility, respectfully requests that the Court deny the petition for a writ of certiorari, seeking review of the United States Court of Appeals for the Second Circuit's opinion in this case. That opinion is not reported.

QUESTION PRESENTED

Whether a writ should issue to review the Second Circuit Court of Appeals' affirmance of the District Court's order denying petitioner's motion for dismissal without prejudice where the reasons now urged as to why the motion should have been granted were never presented to the District Court, the issue raised by petitioner has no basis in fact, and the determination of whether to grant the motion is a matter resting with the sound discretion of the District Court.

STATEMENT OF CASE

The Facts

On the evening of July 21, 1975, petitioner murdered 18-year-old Anthony Miles and 22-year-old Ping Chan, employees of the Foodway supermarket located in Bronx County, New York, during a gun-point robbery of the supermarket. Both boys were shot twice in the head at point-blank range by the same gun, a .38-caliber revolver. Their bodies were discovered minutes after the murders lying on the supermarket floor next to an open safe.

The motive for the robbery and murders was two-fold. Petitioner had been an employee of the supermarket until March of 1975, when he was fired because of an incident involving checks. Shortly after being discharged, petitioner told a co-worker that Foodway had treated him unfairly and he vowed "to get the company back." Second, petitioner had previously worked with the two dead boys. Thus, petitioner apparently committed the robbery because he felt he was unjustly fired from the store and killed the victims because they would have been able to identify him.

There were three eye-witnesses who observed petitioner during the course of the murder. Fannie Davis, who had seen petitioner 30 to 40 times previously, observed him as he double-parked his green station wagon around the corner from the supermarket, then lead his victims around the corner toward the supermarket. She also saw petitioner immediately after the crime coming from the direction of the supermarket as he entered his car with his cohort, who was holding a paper bag.

Another eyewitness, Collette Di Frisio, observed petitioner, initially, as he walked right by her on his way to the supermarket with Anthony Miles and Ping Chan. Ms. Di Frisio was so close to petitioner that she could clearly see the handle of a gun protruding out of the bag he carried. Ms. Di Friscio also saw petitioner, in the supermarket with his cohort as petitioner, with a gun pointed at the back of Ping Chan, forced Chang to open the safe. Mr. Di Friscio watched petitioner after the robbery and murders as he entered his green Town and Country station wagon with his cohort who was carrying a money-filled paper bag, and drive off. Ms. Di Frisio recorded the license plate number of petitioner's getaway car. Ms. Di Frisio's observations were substantially corroborated by another eyewitness, Frank Gallo.

Two days later, based on information received from eyewitnesses, the police located the getaway car parked behind petitioner's house and staked out the area. When petitioner came outside to check the automobile, he was placed under arrest. Petitioner was taken to the 46th police precinct where he was informed of the charges against him and administered full Miranda warnings. Petitioner responded that he knew all about his rights for he had been arrested previously. Then, petitioner admitted planning the robbery and gave a detailed account of his participation in the robbery and murders but denied being the actual trigger-man. Petitioner placed the blame for the shootings on a factitious third robber.

A few hours later petitioner was again advised of the Miranda warnings by an Assistant District Attorney, indicated he understood them, and stated that he wished to talk of his own free will. Petitioner then gave a statement to the Assistant District Attorney which was substantially similar to the one he had given the police. This statement was stenographically recorded.

The Trial, Verdict, and Sentence

On August 5, 1976, petitioner was convicted, following a trial by jury, of four counts of Murder in the Second Degree [two counts of felony murder and two counts of intentional murder (New York Penal Law § 125.25)]

and one count of Robbery in the First Degree (New York Penal Law § 160.15) and sentenced to four indeterminate terms of imprisonment of 25 years to life on the murder convictions and an indeterminate term of imprisonment of not more than 25 years on the robbery conviction.

The State Court Appeals

On appeal to the Appellate Division of the Supreme Court of the State of New York, First Department, petitioner claimed inter alia that: his guilt was not established by legally sufficient evidence; his confession was involuntary and taken in violation of his Fifth Amendment rights; the introduction at trial of a piece of paper with a license plate number resembling the number of his car violated his right to confront witnesses; and, his attorney was incompetent because he did not adequately prepare the case and made errors during the trial. The Appellate Division, First Department unanimously affirmed the conviction without opinion. People v. Rodriguez, 67 A.D.2d 837 (1st Dept. 1979).

Petitioner then sought permission to appeal to the New York Court of Appeals pursuant to New York Criminal Procedure Law section 460.20. The Honorable Jacob D. Fuchsberg, Associate Judge of the Court of Appeals, denied petitioner leave to appeal on March 26, 1979 (46 N.Y.2d 1084).

The Proceedings in the United States District Court for the Southern District of New York

On August 9, 1979, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York alleging that: the evidence at trial was legally insufficient to establish his guilt; his confessions were involuntary; the introduction in evidence at trial of a piece of paper bearing a license plate number violated his right to confront witnesses; and, his trial attorney's representation was inadequate because he did not argue at the state omnibus suppression hearing that petitioner's confession was involuntary although,

according to petitioner's testimony at the hearing, he requested to see a friend and an attorney before confessing. The petition was referred to Magistrate Ruth B. Washington who filed a report and recommendation that the petition be dismissed. Thereafter, petitioner filed a motion pursuant to Rule 41 of the Federal Rules of Civil Procedure seeking dismissal of his petition on the ground that the district court lacked jurisdiction to entertain it, since all the claims raised in the petition had not been exhausted. Respondent filed a response opposing voluntary dismissal and the District Court subsequently denied the motion and the petition.

In denying the motion for voluntary dismissal, the District Court recognized that it had the power to rule on the merits of the exhausted claims and that there was no reason not to determine the matters presented in the petition.

The Appeal To The United States Court Of Appeals For The Second Circuit

On appeal to the Court of Appeals for the Second Circuit, petitioner claimed that his confession was involuntary and taken in violation of his Fifth Amendment rights, that the admission of a slip of paper resembling the license plate number of his car, admitted in evidence at trial, deprived him of his right to confront, that his trial attorney was incompetent, and that the District Court erred in denying his motion for voluntary dismissal. All these claims were unanimously rejected by the Second Circuit Court of Appeals on the merits or because petitioner failed to exhaust state remedies.

ARGUMENT

POINT

A WRIT SHOULD NOT ISSUE TO REVIEW THE SECOND CIRCUIT COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S ORDER DENYING PETITIONER'S MOTION FOR DISMISSAL WITHOUT PREJUDICE OF HIS HABEAS PETITION SINCE THE REASONS NOW URGED AS TO WHY THE MOTION SHOULD HAVE BEEN GRANTED WERE NEVER PRESENTED TO THE DISTRICT COURT, THE QUESTION RAISED HAS NO BASIS IN FACT, AND THE DETERMINATION OF WHETHER TO GRANT THE MOTION IS A MATTER RESTING WITH THE SOUND DISCRETION OF THE DISTRICT COURT.

In his habeas petition in the United States District Court for the Southern District of New York petitioner alleged that his confession was involuntary because his request to see a police officer, who was a friend, and an attorney, was not honored by the police. Petitioner also alleged that his state trial attorney was incompetent because during the state suppression hearing the attorney did not argue that the confession should be suppressed because petitioner requested counsel. The District Court referred the petition to a federal magistrate who recommended that the petition be denied finding that the confessions were voluntary and that with respect to the claim of ineffective assistance of counsel, petitioner failed to exhaust state remedies. Aware of the magistrate's recommendation, petitioner moved pursuant to Rule 41 of the Federal Rules of Civil Procedure to dismiss the petition without prejudice on the ground that the District Court lacked jurisdiction to entertain the petition since all claims had not been exhausted. The district court, then, denied the motion because it had jurisdiction to decide the exhausted claims. The district court also agreed with the magistrate's finding that the confessions were voluntary and that the claim of ineffective assistance of counsel was not exhausted.

On appeal to the United States Court of Appeals, petitioner argued, for the first time, that his motion for dismissal without prejudice should have been granted because the claims of voluntariness of the confessions and ineffective assistance of counsel were factually related. In rejecting

this claim, the Court of Appeals determined that the District Court did not abuse its discretion in refusing to grant the motion and that the District Court had jurisdiction to decide the exhausted claims.

Petitioner now claims that a writ of certiorari should be granted to review the denial of his motion for dismissal, because the exhausted and unexhausted claims are factually related. If in fact this claim was actually present in the case at bar, it would certainly be worthy of review by this Court since the Circuits which have discussed this question have uniformly recognized that habeas petitions containing related exhausted and unexhausted claims should not be heard until all claims are exhausted, [see United States ex rel. Trantino v. Hatrack, 563 F.2d 86 (3d Cir. 1977), cert. denied, 435 U.S. 928 (1978); Gonzales v. Stone, 546 F.2d 807 (9th Cir. 1976); Miller v. Hall, 536 F.2d 967 (1st Cir. 1976); Blunt v. Wolff, 501 F.2d 1138 (8th Cir. 1974); Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969); United States ex rel. McBride v. Fay, 370 F.2d 547 (2d Cir. 1966); see also, 43 ALR FED 640] and this Court has never addressed the question.* However, there are a number of reasons why this issue should not be reviewed.

First, in the District Court petitioner predicated his motion for dismissal on jurisdictional grounds and never maintained that dismissal was warranted because the exhausted and unexhausted claims were related. Thus, having failed to present the same reasons for granting the motion in the District Court and the Circuit Court of Appeals, petitioner has waived this claim on appeal. See United States v. Ochs, 595 F.2d 1247, 1260 n.11 (2d Cir. 1979), cert. denied, ___ U.S. ___, 100 S. Ct. 435 (1979); United States v. Bowdach, 561 F.2d 1160, 1170 (5th Cir. 1977); United States v. Garguilo, 554 F.2d 59, 63 (2d Cir. 1977); United States v. Castanon, 453

* Petitioner believes that when this Court decides Rose v. Lundy, 49 U.S.L.W. 3617, (cert. granted February 23, 1981) it will determine the outcome of the instant case. Nothing could be less accurate. Rose involves the propriety of deciding unexhausted claims that are related to exhausted claims. Nowhere does petitioner contend that the merits of his unexhausted claims should have been considered.

F.2d 932, 935 (9th Cir. 1972).

Second, petitioner's contention that the exhausted and unexhausted claims are related is merely a figment of the appellate imagination. The factual allegation that purportedly links the two claims - that petitioner requested to see an attorney and a friend before he confessed - is no longer in the case. During the state suppression hearing petitioner testified that he requested to speak to a friend and attorney before confessing. The state hearing court found this testimony unworthy of belief and this factual determination was accepted by the federal courts. Therefore, the chain linking the exhausted and unexhausted claims has been forever broken. It, therefore, follows that the claims are not related. Thus, the question presented by petitioner for review does not exist in the instant case.

Finally, since the determination of whether a motion for dismisal without prejudice should be granted is a matter resting within the sound discretion of the District Court. [See, United States v. Wyoming National Bank of Casper, 505 F.2d 1044 (10th Cir. 1974); Armstrong v. Frostie Co., 453 F.2d 914, 916 (4th Cir. 1971); United States v. Gunc, 435 F.2d 465, 467 (8th Cir. 1970)], it was impossible for that court to have abused its discretion because it never had an opportunity to consider the reasons petitioner now urges for granting the motion. Having based his motion on jurisdictional grounds, and having later conceded that the District Court had jurisdiction to entertain the petition (petitioner's brief in the Court of Appeals, page 45), the District Court's decision was entirely proper. Thus, it can not be successfully maintained that this case is worthy of review.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD, IN ALL RESPECTS, BE DENIED.

Respectfully submitted,

MARIO MERCOLA
District Attorney
Bronx County
Attorney for Respondent

ALAN D. MARRUS
DAVID H. FROMM
Assistant District Attorneys
Of Counsel

September 1981

amr